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Supreme Court of the United States

October Term, 1977

No. 77-1239

FIRST NATIONAL BANK OF AKRON,
Petitioner,

vs.

THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Second Circuit

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TABLE OF CONTENTS

Reference to Opinions Below 1

Jurisdictional Statement 2

Question Presented 2

Federal Statutory Provisions 2

Statement of the Case 3

Reason for Granting the Writ:

12 U.S.C. §94 Which Provides That All "Actions and Proceedings" Against a National Bank Must Be Had in the District in Which the Bank Is Established Precludes Transfer of a Suit Against a National Bank to Another District for Coordinated or Consolidated Pretrial Proceedings Under 28 U.S.C. §1407 6

A. Pretrial discovery is a Section 94 proceeding and therefore can only be had in the district where a national bank is established 7

B. 12 U.S.C. §1407 did not effect a pro tanto repeal of the provisions of 12 U.S.C. §94 which provides that proceedings against a national bank can only be had in the district in which it is established 10

C. 12 U.S.C. §1407 cannot be used to circumvent the mandatory provisions of 12 U.S.C. §94 13

Appendix:

Opinion and Order of the Judicial Panel on Multidistrict Litigation A1

Order of the United States Court of Appeals for the Second Circuit A13

Order of the United States District Court for the Southern District of New York A14

TABLE OF AUTHORITIES

Cases

American Shipbuilding Co. v. Whitney, 190 F. 109 (C.C.N.D. Ohio 1911) 9

James Bloor, As Trustee Pursuant to Chapter X of Title 11 of the Estates of Investors Funding Corporation of New York, et al. v. First National Bank of Akron, C76-336A (N.D.Oh. 1976) 3

James Bloor, As Trustee Pursuant to Chapter X of Title 11 of the Estates of Investors Funding Corporation of New York, et al. v. Jerome Dansker, et al., 76 Civ. 4676 (S.D.N.Y. 1976) 4

Citizens and Southern Nat. Bank v. Bougas, ... U.S. ....., 54 L. Ed. 2d 218, 98 S. Ct. ..... (1977) 12

Commercial Credit Co. v. McReynolds, 68 F.2d 990 (D.C. App. 1934) 9

Erwin v. United States, 37 F. 470 (S.D. Ga. 1889), *rev'd on other grounds sub nom., United States v. King*, 147 U.S. 676 (1893) 8

Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973), *cert. den'd*, 416 U.S. 956 (1974) 8

In re Falstaff Brewing Corp. Antitrust Litigation, 434 F. Supp. 1225 (J.P.M.L. 1977) 6, 8

In re Great Western Ranches Litigation, 369 F. Supp. 1406 (J.P.M.L. 1974) 6

In re Pittsburgh & Lake Erie R. Co. Sec. & Antitrust Lit., 374 F. Supp. 1404 (J.P.M.L. 1974) 6

In re Truck Accident near Alamagordo, New Mexico, 387 F. Supp. 732 (J.P.M.L. 1975) 13

Klein v. Bower, 421 F.2d 338 (2nd Cir. 1970) 13

Mercantile Nat. Bank v. Langdeau, 371 U.S. 555 (1963) 7, 13

Morton v. Mancari, 417 U.S. 535 (1974) 11, 12

Murphy v. The First National Bank of Chicago, 228 N.W.2d 372 (Ia. 1975) 8, 9

Northside Iron & Metal Co., Inc. v. Dobson & Johnson, Inc., 480 F.2d 798 (5th Cir. 1973) 7

Posadas v. National City Bank, 296 U.S. 497 (1936) 11

Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976) 6, 7, 10, 11

Riley v. Union Pacific R.R. Co., 177 F.2d 673 (7th Cir. 1949), *cert. den'd*, 338 U.S. 911 (1950) 8

Super Valu Stores, Inc. v. Western Film Service, 416 F. Supp. 662 (D. Minn. 1976) 13

Swiss Israel Trade Bank v. Mobley, 319 F. Supp. 374 (S.D. Ga. 1970) 13

Statutory Provisions

11 U.S.C. §107(d) 4

11 U.S.C. §107(e) 4

11 U.S.C. §110(e) 4

11 U.S.C. §502 4

12 U.S.C. §94 .....2, 6, 7, 8, 9, 10, 11, 12, 13, 14

15 U.S.C. §78aa 10

28 U.S.C. §1254(1) 2

28 U.S.C. §1407 .....2, 4, 6, 7, 8, 9, 10, 11, 12, 13

28 U.S.C. §1407(a) 3, 6, 7, 8, 9, 10, 11, 12, 13

28 U.S.C. §1407(e) 2, 5

Supreme Court of the United States

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No. .....

FIRST NATIONAL BANK OF AKRON,
Petitioner,

vs.

IRVING R. KAUFMAN, Chief Judge, United States Court of Appeals, Second Circuit, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Second Circuit

Petitioner, First National Bank of Akron, prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit entered on December 9, 1977.

REFERENCE TO OPINIONS BELOW

An opinion under date of August 8, 1977 of the Judicial Panel on Multidistrict Litigation has not been officially reported. It is presented in Appendix, p. 1.

An opinion under date of December 9, 1977 of the United States Court of Appeals for the Second Circuit has not been officially reported. It is presented in Appendix, p. 13.

JURISDICTIONAL STATEMENT

On December 9, 1977, the United States Court of Appeals for the Second Circuit denied a petition for an extraordinary writ in the nature of certiorari and mandamus which petitioner and others had filed pursuant to 28 U.S.C. §1407(e) seeking a review of an Order of the Judicial Panel on Multidistrict Litigation.

Jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does 12 U.S.C. §94 which provides that all "actions and proceedings" against the First National Bank of Akron must be had in the Northern District of Ohio, the district in which it is established, preclude a transfer under 28 U.S.C. §1407 of a suit filed in the Northern District of Ohio against the First National Bank of Akron to the Southern District of New York for coordinated or consolidated pretrial proceedings?

FEDERAL STATUTORY PROVISIONS

The statutory provisions which are involved in this petition are the following:

12 U.S.C. §94:

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

28 U.S.C. §1407(a):

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multi-district litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

STATEMENT OF THE CASE

Petitioner, First National Bank of Akron, is a national bank, with its principal place of business in Akron, which is geographically within the Northern District of Ohio.

Petitioner is the defendant in a civil action filed October 21, 1976, in the United States District Court for the Northern District of Ohio, captioned *"James Bloor, as Trustee, Pursuant to Chapter X of Title 11 of the Estates of Investors Funding Corporation of New York, et al. vs. First National Bank of Akron"*, designated as Case Number C76-336A, in the Northern District of Ohio, and assigned to Judge Leroy J. Contie, Jr. Jurisdiction was in-

voked, among other sections, under 11 U.S.C. §§107(e), 110(e) and 502.

Petitioner is also a co-defendant along with 187 other defendants, in a civil action by the same plaintiff filed October 12, 1976, in the United States District Court for the Southern District of New York, captioned *"James Bloor, as Trustee, Pursuant to Chapter X of Title 11 of the Estates of Investors Funding Corporation of New York, et al. vs. Jerome Dansker, et al."*, designated as Case Number 76 Civ. 4676, and assigned to Judge William C. Conner.

Both actions assert the identical claims against this petitioner, it being claimed that the First National Bank of Akron received a transfer which was voidable by virtue of both the New York and Ohio Fraudulent Conveyance Act (both states, with minor variations, having adopted the Uniform Fraudulent Conveyance Act) or the Bankruptcy Act Fraudulent Conveyance Section, 11 U.S.C. §107(d), with other claims for relief based on the same allegations.

On December 2, 1976, James Bloor, as Trustee pursuant to Chapter X of the Bankruptcy Act, filed a motion before the Judicial Panel on Multidistrict Litigation, to transfer the case against this petitioner, pending in the Northern District of Ohio, and other cases, to the Southern District of New York pursuant to 28 U.S.C. §1407. Petitioner opposed the motion to transfer and orally argued at the hearing against such transfer.

In the matter pending in the Southern District of New York, this petitioner, as a defendant, moved to dismiss or to transfer to the proper district, based on improper venue in the Southern District of New York, and to dismiss based on lack of personal jurisdiction in the Southern District of New York.

The case against this petitioner pending in the Northern District of Ohio was transferred by the Judicial Panel on Multidistrict Litigation on August 8, 1977 by Order directing such transfer to the Southern District of New York, for coordinated or consolidated pretrial proceedings with various other actions pending in the Southern District of New York.

Petitioner and other national banks timely sought review of the Order of the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. §1407(e). To this end, a petition for an extraordinary writ in the nature of certiorari and mandamus was filed in the United States Court of Appeals for the Second Circuit. The petition was subsequently denied without benefit of a written opinion or argument by the United States Court of Appeals for the Second Circuit, by Order entered on the 9th day of December 1977.

Petitioner is seeking review of the Order of the United States Court of Appeals for the Second Circuit which denied its petition for an extraordinary writ, directed to the Panel, to enter an Order denying and reversing the transfer of the Northern District of Ohio case.

REASON FOR GRANTING THE WRIT

12 U.S.C. §94 WHICH PROVIDES THAT ALL "ACTIONS AND PROCEEDINGS" AGAINST A NATIONAL BANK MUST BE HAD IN THE DISTRICT IN WHICH THE BANK IS ESTABLISHED PRECLUDES TRANSFER OF A SUIT AGAINST A NATIONAL BANK TO ANOTHER DISTRICT FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS UNDER 28 U.S.C. §1407.

Petitioner submits that the decisions below misconstrued the power of the Judicial Panel on Multidistrict Litigation (Panel) to transfer its case to the Southern District of New York under 28 U.S.C. §1407, and in so doing ignored the dictates of 12 U.S.C. §94 and the recent decision of this Court in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976).

The Panel has considered the relationship between 12 U.S.C. §94 and 28 U.S.C. §1407 in several reported decisions prior to the one which underlies this petition. *In re Great Western Ranches Litigation*, 369 F. Supp. 1406 (J.P.M.L. 1974); *In re Pittsburgh & Lake Erie Railroad Company Securities & Antitrust Litigation*, 374 F. Supp. 1404 (J.P.M.L. 1974); *In re Falstaff Brewing Corporation Antitrust Litigation*, 434 F. Supp. 1225 (J.P.M.L. 1977).

In its decision below, the Panel stated:

> [i]n response to similar arguments opposing the transfer of actions in which national banks are defendants, the Panel has ruled as follows: 'We see no reason, including anything in *Radzanower*, to exempt actions involving national banks from transfer under Section 1407.' *In re Investors Funding Corporation of New York Securities Litigation.* (Appendix p. 8)

Unless and until guidance is supplied by appellate courts, the Panel will doubtless adhere to its analysis of 12 U.S.C. §94. The denial of the writ by the Court of Appeals provides no such guidance.

A. Pretrial Discovery Is a Section 94 Proceeding and Therefore Can Only Be Had in the District Where a National Bank Is Established.

Section 94 of the National Bank Act, 12 U.S.C. §94, provides that all "actions and proceedings" against First National Bank of Akron shall be in the Northern District of Ohio. Although the statute uses the word "may", the language of 12 U.S.C. §94 has been held to be mandatory. *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 562-63 (1963). *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 152 (1976). There is a rational basis for the special treatment accorded national banks. *Northside Iron & Metal Co., Inc. v. Dobson & Johnson, Inc.*, 480 F.2d 798, 800 (5th Cir. 1973).

As this Court noted in *Radzanower, supra* at 156.

> The venue provision of the National Bank Act, §94, was intended . . . for the convenience of those [banking] institutions, and to prevent interruption in their business that might result from their books being sent to distant counties . . . . *Charlotte Nat. Bank v. Morgan*, 132 U.S. 141, 1945, quoted in *Mercantile Nat. Bank v. Langdeau*, 371 U.S., at 561-562 n.12.

28 U.S.C. §1407 essentially is designed to facilitate discovery where multiparty actions are pending in more than one district. When certain requirements are satisfied, pretrial proceedings "may be transferred". A case may ac-

tually be determined by a transferee court since it has the power to grant summary judgment. *Humphreys v. Tann,* 487 F.2d 666 (6th Cir. 1973), *cert. den'd,* 416 U.S. 956 (1974).

The Panel noted below that "[i]n considering transfer under Section 1407, the Panel is not encumbered by considerations of venue including those under 12 U.S.C. §94." *In re Investors Funding Corporation of New York Securities Litigation* (Appendix, p. 8), quoting *In re Falstaff Brewing Corporation Antitrust Litigation,* 434 F. Supp. 1225, 1229 (J.P.M.L. 1977). That observation does not confront the issue of whether the "proceedings" of 12 U.S.C. §94 connotes more than the place of trial.

"Venue" refers to the place where a lawsuit may be heard and determined. *Riley v. Union Pacific R.R. Co.,* 177 F.2d 673, 675 (7th Cir. 1949), *cert. den'd,* 338 U.S. 911 (1950). But 12 U.S.C. §94 is not the typical venue statute which focuses on types of claims or geographical location of defendants. Section 94 focuses on "actions and proceedings" involving a particular type of defendant.

"Proceedings" are defined as "the forum in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of defending them, and of executing" and include the "regular and usual mode of carrying on a suit by due course at common law". *Erwin v. United States,* 37 F. 470, 488 (S.D. Ga. 1889), *rev'd on other grounds sub nom., United States v. King,* 147 U.S. 676 (1893).

The motion of the Trustee under 28 U.S.C. §1407 sought a consolidation or coordination of pretrial discovery proceedings with respect to the merits of all of the actions, and as the Iowa Supreme Court said in *Murphy v. The First National Bank of Chicago,* 228 N.W.2d 372 (Ia.

1975), ". . . there is a measure of logic in defendants' contention [that] the taking of depositions and filing of interrogatories constitute 'proceedings' within the intendment of 12 U.S.C.A. 94." *Murphy, supra* at 377. In that case, the court explicitly limited discovery against a national bank sued outside of its home district to the ascertainment of whether or not the national bank had waived the protection of 12 U.S.C. §94. No discovery was permitted on the merits of the lawsuit since such discovery would constitute a "proceeding" within the meaning of Section 94.

In other contexts pretrial discovery has been held to fall within the definition of "proceedings". In *Commercial Credit Co. v. McReynolds,* 68 F.2d 990 (D.C. App. 1934) interrogatories to the wife of a judgment debtor were within the purview of a provision of the District of Columbia Code which provided that in civil proceedings a wife was competent but not compellable to testify against her husband. In *American Shipbuilding Co. v. Whitney,* 190 F. 109 (C.C.N.D. Ohio 1911), the court held that taking depositions amounted to a proceeding in a state court under Section 720 of the Revised Statutes of the United States which provided, "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state . . . ."

Thus it seems clear that 12 U.S.C. §94 provides for more than the mere place of trial and that the "proceedings" of 12 U.S.C. §94 include, among other things, the "pretrial proceedings" of 28 U.S.C. §1407. Furthermore, as noted above, the entire action which was filed in the Northern District of Ohio might be determined in the Southern District of New York since the transferee court has the power to grant summary judgment.

The decisions below resolved the apparent conflict between 12 U.S.C. §94, which provides that all proceedings

against a national bank shall be in the home district, and 28 U.S.C. §1407, which provides that pretrial proceedings may be transferred, in favor of 28 U.S.C. §1407. The result is that Section 94 provides no protection to the petitioner at the pretrial level, notwithstanding the fact that "proceedings" are being conducted in the Southern District of New York pursuant to the Panel's Order.

B. 12 U.S.C. §1407 Did Not Effect a Pro Tanto Repeal of the Provisions of 12 U.S.C. §94 Which Provides That Proceedings Against a National Bank Can Only Be Had in the District in Which It Is Established.

The decision of this Court in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976), which reaffirmed the meaning and effect of 12 U.S.C. §94, was apparently deemed irrelevant by the Panel and the Court of Appeals. In *Radzanower* this Court was confronted with an apparent conflict between two statutes: 12 U.S.C. §94 and the venue provision of the Securities Exchange Act, 15 U.S.C. §78aa. The petitioner in *Radzanower* had instituted a class action in the District Court for the Southern District of New York, against many defendants, including the First National Bank of Boston, alleging violation of federal securities law. The bank moved to dismiss, relying on 12 U.S.C. §94. The motion was granted by the trial court and subsequently affirmed by the Court of Appeals and by this Court. Petitioner's argument that there had been a *pro tanto* repeal of §94 was unsuccessful.

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. *Radzanower, supra* at 153, citing *Morton v. Mancari*, 417 U.S. 535.

Section 94 clearly deals with a precise narrow subject matter, while Section 1407 deals with the general subject of pretrial discovery. However, there are two exceptions to the principle that *pro tanto* repeals are not favored:

> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. *But, in either case, the intention of the legislature to repeal must be clear and manifest . . . . Radzanower, supra* at 154, citing *Posadas v. National City Bank*, 296 U.S. 497, 503. (Emphasis added)

Those exceptions are just as inapplicable here as they were in *Radzanower*.

There is no irreconcilable conflict. The two statutes can co-exist. The basic purposes of 28 U.S.C. §1407 will not be frustrated by precluding transfer as to national banks since transfer in the vast majority of cases would not be affected. Discovery could still be had against a national bank in its home district.

Not only is there no irreconcilable conflict, but the statutes can be harmonized in the following manner: 28 U.S.C. §1407 provides that certain civil actions may be transferred and those actions shall be transferred upon, among other things, a determination that a transfer will be for the convenience of the parties. 12 U.S.C. §94 provides that for the convenience of national banks, all

proceedings against them shall be in the home district. Accordingly, 12 U.S.C. §94 can be read as creating an irrebuttable presumption that as to national banks, the convenience element of 28 U.S.C. §1407 can never be satisfied.

Petitioner's interpretation of the two statutes would give full effect to the goals of Section 94, i.e. the convenience of banking institutions and the prevention of interruption of their business, without frustrating the goals of Section 1407.

> [W]hen two statutes are capable of co-existence, it is the duty of courts, absent a clearly expressed legislative intention to the contrary, to regard each as effective. *Morton v. Mancari,* 417 U.S. 535, 551 (1974).

This Court's decision in *Citizens & Southern Nat. Bank v. Bougas,* ..... U.S. ....., 54 L. Ed. 2d 218, 98 S. Ct. ..... (1977), was predicated on the fact that its interpretation of the word "located" under 12 U.S.C. §94 would not "inconvenience the bank or unfairly burden it with distant litigation in violation of any congressional policy." *Supra* at 226 n.10. The same concern for the congressional policy is not reflected in the opinions below.

As to the second possible exception, 28 U.S.C. §1407 does not cover the whole subject of 12 U.S.C. §94 and was not intended as a substitute for any provisions of the National Bank Act. The National Bank Act regulates banks. The legislation on multidistrict litigation is not designed to regulate banks. There is nothing in the legislative history to support the conclusion that a *pro tanto* repeal of Section 94 was intended, with some aspects of bank regulation being transferred to 28 U.S.C. §1407.

If Congress actually intended to repeal a portion of 12 U.S.C. §94, let it do so directly. *Mercantile Nat. Bank. v. Langdeau,* 371 U.S. 555, 577 (1963). If Section 94 imposes inconvenience on plaintiffs in the pretrial context, the proper remedy lies in legislation. *Klein v. Bower,* 421 F.2d 338, 342 (2nd Cir. 1970).

C. 12 U.S.C. §1407 Cannot Be Used to Circumvent the Mandatory Provisions of 12 U.S.C. §94.

Attempts to obviate Section 94 have been disapproved in other contexts. *In re Truck Accident near Alamagordo. New Mexico,* 387 F. Supp. 732 (J.P.M.L. 1975); *Swiss Israel Trade Bank v. Mobley,* 319 F. Supp. 374 (S.D. Ga. 1970); *Super Valu Stores, Inc. v. Western Film Service,* 416 F. Supp. 662 (D. Minn., 1976).

To date, the Trustee's end run around 12 U.S.C. §94 has been eminently successful. The Trustee filed identical actions as to petitioner in both the Northern District of Ohio and the Southern District of New York. The former was transferred to the Southern District for pretrial discovery under the Panel's Order. In denying the Petitioner's motion to dismiss in the original Southern District, action, the District Court reasoned that since the First National Bank of Akron was in the Southern District of New York under Section 1407 in any event, it was not necessary to grant the motion at that time. (Appendix, p. 14) Thus, petitioner is being denied a prompt determination of what the magistrate characterized in Report No. 7 to Judge William C. Conner as a matter of "real substance." A discovery deadline and trial date had been set in Ohio before the transfer. The door will be opened to a vindication of 12 U.S.C. §94 and a prompt adjudica-

tion of the claims against petitioner only if this petition is granted.

CONCLUSION

For the reasons set forth herein, petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

OPINION AND ORDER OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

(Filed August 8, 1977)

Docket No. 2

BEFORE THE JUDICIAL PANEL
ON
MULTIDISTRICT LITIGATION

IN RE INVESTORS FUNDING CORPORATION OF NEW YORK SECURITIES LITIGATION

OPINION AND ORDER

BEFORE JOHN MINOR WISDOM, CHAIRMAN, AND EDWARD WEINFELD, EDWIN A. ROBSON, WILLIAM H. BECKER*, JOSEPH S. LORD, III*, STANLEY A. WEIGEL*, AND ANDREW A. CAFFERTY, JUDGES OF THE PANEL

PER CURIAM

This litigation consists of seven actions pending in five federal districts—three in the Southern District of New York and one each in the Northern District of Illinois, the Northern District of Ohio, the Eastern District of Virginia and the District of the District of Columbia. The actions center around the investment activities of

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*Judges Becker, Lord and Weigel took no part in the consideration or decision of this matter.

Investors Funding Corporation of New York, Investors Funding Collateral Corporation and a number of related corporations (collectively referred to as IFC). The principal business of IFC, prior to its entrance into bankruptcy proceedings during October 1974, was the purchase and sale of real property, the making of mortgage loans, and participation in other real estate related transactions.

Bloor, one of the actions pending in the Southern District of New York, was brought under the federal securities laws and the bankruptcy laws, *inter alia*, by the trustee in bankruptcy for IFC against nearly 200 named defendants and 24 "Doe" defendants. Included as defendants are the officers and directors of IFC; the trustees of IFC's profit sharing plan; attorneys, accountants and appraisers of real estate for IFC; several real estate ventures and the participants in those ventures; several banks; over 100 alleged recipients of voidable fraudulent transfers of IFC's assets; and 22 alleged recipients of voidable preferential transfers of IFC's assets. *Bloor* is also brought against separate purported defendant classes consisting of the partners in two of the defendant accounting firms or various participants in the named real estate ventures. The complaint in *Bloor* contains allegations concerning a wide variety of activities of the different defendant groups. The officers, directors, attorneys, accountants and appraisers are alleged to have participated in a scheme through which the assets and profits of IFC were overstated and the liabilities and losses of IFC were understated, thereby allowing profits to be reported when none were earned and presenting the creditors of IFC and investors in IFC with a false and misleading impression of the financial condition of IFC. The officers and directors allegedly engaged in a series of sham transactions and purchase and buy-back agreements designed to inflate falsely the assets and profits of IFC.

The appraisers allegedly predicted income figures for properties of IFC that were significantly higher than realistically might be expected and predicted unreasonably low expenses for the properties. The defendant banks, which are creditors of IFC, allegedly concealed certain inside information about IFC's financial condition and used that information to their benefit and to the detriment of the other creditors of IFC and the public. Fourteen of the fifteen original bank defendants are alleged to have collectively entered into certain credit and security agreements with IFC through which unsecured loans made to IFC by the banks were converted to secured loans, thereby giving the banks a position superior in interest to that of other creditors of IFC. These fourteen banks and one of the principals of IFC are also alleged to have entered into a secret verbal agreement which required proceeds from the sale of properties by IFC to be paid to the banks to reduce the loans outstanding rather than be reinvested by IFC in other properties, thereby resulting in a secret liquidation of the assets of IFC for the benefit of the banks. Several defendants, including many of the defendant real estate ventures and the participants in those ventures, are alleged to have participated in voidable fraudulent transfers of real property or other assets of IFC, to the financial detriment of IFC. Other defendants are alleged to have received transfers of the assets of IFC which are voidable preferences. The trustee asks for damages and the return of all assets of IFC that were transferred in voidable transactions.

Katz was instituted in the Southern District of New York under the federal securities laws, *inter alia*, as a class action on behalf of all purchasers of IFC common stock during the period from December 31, 1967 to October 21, 1974. Many of the same individuals or organizations that

are named as defendants in *Bloor* are named as defendants in *Katz*. Plaintiffs in *Katz* allege that defendants participated in fraudulent activities and the issuance of false and misleading statements which impaired the value of plaintiffs' investments in IFC. The specific activities in question include sham transactions at year's end to improve artificially IFC's balance sheet and income statement, purchase and buy-back transactions at inflated prices, and overstatement and misappropriation of IFC's assets.

Morse, the third action pending in the Southern District of New York, was brought under the federal securities laws, *inter alia*, as a class action on behalf of purchasers of certain IFC debentures during the period from July 28, 1972 to October 21, 1974. Defendants in this action are individual officers and directors of IFC, IFC's accountants, and three underwriters of IFC securities. The substantive allegations of fact in *Morse* are very similar to those made in *Katz*.

The four actions pending in districts other than the Southern District of New York (the bank actions) were each instituted by the trustee in bankruptcy for IFC against a single national bank. These four national banks were originally among the fifteen banks named as defendants in *Bloor*, but each of the four have since been dismissed or have made motions for dismissal from that action under the venue provision of the National Bank Act, 12 U.S.C. §94. The original complaints in the bank actions were identical to the complaint in *Bloor*. Subsequently, substantially amended complaints have been filed in the Virginia, Illinois and Ohio actions. The amended complaints in the Virginia and Illinois actions are brought under the federal securities laws and the bankruptcy laws, *inter alia*. The allegations which are made against the

defendant bank in each of those two complaints are essentially the same as the allegations which are made against the bank defendants in the complaint in *Bloor*. The amended complaint in the Ohio action is brought under the bankruptcy laws, *inter alia*. In that complaint, the trustee alleges that the defendant, First National Bank of Akron (Akron bank), caused a fraudulent transfer of certain funds of IFC to be made to the bank when the bank offset funds on deposit with it against the balance due on unsecured loans taken out by IFC. The trustee alleges that the Akron bank was in possession of confidential inside information concerning the financial condition of IFC when the transfer was made and that the transfer was made with the intent to hinder and defraud existing and future creditors of IFC. The trustee requests that the transfer be voided and that the claims of the Akron bank be subordinated to the claims of other creditors of IFC.

Plaintiff in *Bloor* and the four bank actions moves the Panel, pursuant to 28 U.S.C. §1407, to transfer the foregoing actions pending in districts other than the Southern District of New York to that district for coordinated or consolidated pretrial proceedings with the three actions pending there.[1] Twelve defendant banks oppose transfer. We find that these actions involve common questions of fact and that their transfer to the Southern District of New York pursuant to Section 1407 will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.

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1. Plaintiff's motion originally included another action, *Bloor, et al. v. Dansker, et al.*, S.D.N.Y., 69-Civ-2741, but at the Panel hearing on this motion, plaintiff apparently retreated from including this action in the motion. Transcript at 2-3. Plaintiff advised the Panel that this action "has been, for all intents and purposes, settled." *Id.* at 3. No party disputed plaintiff's characterization of this action. Accordingly, we deem this action withdrawn from plaintiff's motion.

Several of the defendant banks contend, in opposition to transfer, that the four bank actions which are pending in districts other than the Southern District of New York are distinct from the actions pending in that district. *Katz* and *Morse*, the banks maintain, involve no issues in common with the claims against the banks. The complaint in *Bloor*, they assert, attempts to combine numerous claims against many unrelated defendants in a single action. The banks stress that the claims in *Bloor* concerning the massive fraud perpetrated by the principals of IFC are distinct from the claims made against each bank for the return of certain voidable preferences which were received in a small number of transactions. The banks assert that the vast majority of the issues involved in the New York actions are irrelevant to the banks. The minimal common aspects which are involved, the banks argue, are far outweighed by the predominance of unique issues among the actions.

Defendant Akron bank stresses, in opposition to transfer of the Ohio action, that the Akron bank is not alleged to have been a party to the security agreements which were executed by the other banks. The Akron bank states that claims against it are asserted only in connection with its offset of certain funds on deposit from IFC against loans outstanding to IFC. Therefore, the Akron bank contends, discovery in the Ohio action will relate only to the offset transaction, and will not involve the myriad of issues covered by the other actions.

We find these arguments unpersuasive. On the basis of the record before us, all seven actions, including the Akron bank action, involve substantial common questions of fact concerning the financial condition of IFC. In addition, *Bloor* and the Virginia, Illinois and District of Columbia bank actions share questions of fact concerning

the alleged collective activities of the banks and others in regard to IFC and the effect of those activities upon IFC, other creditors of IFC and other interested persons. Transfer under Section 1407 will therefore eliminate duplicative discovery, avoid the possibility of conflicting pretrial rulings and conserve judicial effort. Discovery on any issues that are unique to a particular action may be scheduled by the transferee judge to proceed concurrently with the common pretrial matters. *See In re Republic National-Realty Equities Securities Litigation*, 382 F. Supp. 1403, 1405-06 (J.P.M.L. 1974).

The defendant banks argue that the venue provision of the National Bank Act, 12 U.S.C. §94, prohibits the transfer pursuant to 28 U.S.C. §1407 for coordinated or consolidated pretrial proceedings of actions in which national banks are defendants. One bank maintains that Section 94 requires all proceedings against a national bank, trial as well as pretrial, to take place within the bank's home district. The banks stress that Section 94 was enacted for the convenience of the national banks to protect them from having to move their records outside their home districts. This policy of the Act, they assert, as discussed in the recent United States Supreme Court case of *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976), would be violated by transferring the actions against the banks for pretrial purposes. The banks urge that, with respect to the four actions in which national banks are defendants, the motion before the Panel is in reality an attempt to circumvent the venue restrictions of the National Bank Act. They contend that movant is attempting to misuse Section 1407, citing *In re Highway Accident Near Rockville, Connecticut*, 388 F. Supp. 574, 576 (J.P.M.L. 1975) and *In re Truck Accident Near Alamagordo, New Mexico*, 387 F. Supp. 732, 734 (J.P.M.L.

1975), and they request that the Panel accordingly deny transfer in this litigation. If the Panel determines that transfer under Section 1407 is not restricted by the venue provision of the National Bank Act, the banks urge the Panel nevertheless to give deference to the policy behind that venue provision by denying transfer.

In response to similar arguments opposing the transfer of actions in which national banks are defendants, the Panel has ruled as follows:

> We see no reason, including anything in *Radzanower*, to exempt actions involving national banks from transfer under Section 1407. In considering transfer under Section 1407, the Panel is not encumbered by considerations of venue, including those under 12 U.S.C. §94. *In re Great Western Ranches Litigation*, 369 F. Supp. 1406, n. 1 (J.P.M.L. 1974). The fact that defendants may not all be amenable to suit in the same jurisdiction does not prevent transfer of the actions against them to a single district for pretrial proceedings where the prerequisites of Section 1407 are otherwise satisfied. *In re Kauffman Mutual Fund Actions*, 337 F. Supp. 1337, 1339 (J.P.M.L. 1972). Indeed, 28 U.S.C. §1407(a) states that "actions may be transferred to *any district* for coordinated or consolidated pretrial proceedings." (Emphasis added.) The legislative history of Section 1407 is also instructive on this point. *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 499-500 (J.P.M.L. 1968). The recent *Radzanower* opinion by the Supreme Court has no effect on transfers under Section 1407 because the opinion deals exclusively with the question whether the venue provision of the National Bank Act or the venue provision of the Securities Exchange Act controls in the event a national banking association is sued in a federal

> court for allegedly violating the Securities Exchange Act.
>
> Furthermore, we see no reason to accord national banks any special treatment in considering transfer of actions under Section 1407. The Panel's statutory mandate is to weigh the interests of all the plaintiffs and all the defendants, and to consider multidistrict litigation as a whole in light of the purposes of the law. *In re Library Editions of Children's Books*, 297 F. Supp. 385, 386 (J.P.M.L. 1968).
>
> We emphasize that defendant national banks need not worry about a transferee court's entering an order requiring that their documents be moved outside their home districts for trial because transfers under Section 1407 are for pretrial because transfers under Section 1407 are for pretrial only and the actions against them will be remanded to their home districts for trial. *See* Rule 11, R.P.J.P.M.L., 65 F.R.D. 253, 260-63 (1975). Moreover, we note that transfer of an action under Section 1407 does not mean that all discovery must take place in the transferee district. For example, depositions of witnesses may still occur where they reside, *see* Fed. R. Civ. P. 45(d)(2), and of course any party may request an order from the transferee court that its documents be inspected at its offices or at another convenient location in or near the city in which it is located, *see Manual for Complex Litigation*, Part I, §2.50 (rev. ed. 1973).
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> The defendant banks' reliance on *In re Highway Accident Near Rockville, Connecticut, supra*, and *In re Truck Accident Near Alamagordo, New Mexico, supra*, in suggesting that plaintiffs . . . are attempting to misuse Section 1407 in seeking transfer is mis-

placed. Those two litigations did not otherwise meet the standards for transfer under Section 1407, in contrast to the litigation now before us. Here significant benefits are to be gained by coordinated or consolidated pretrial proceedings. *In re Falstaff Brewing Corporation Antitrust Litigation*, ... F. Supp. ....., ... (J.P.M.L., filed June 3, 1977).

This reasoning is equally dispositive of the arguments of the defendant national banks in the litigation now before us.

The Southern District of New York is clearly the most appropriate transferee forum for this litigation. Investors Funding Corporation of New York and Investors Funding Collateral Corporation are headquartered within that district and therefore many of the relevant documents and witnesses are located in the New York vicinity. *See In re U.S. Financial Securities Litigation*, 375 F. Supp. 1403, 1404 (J.P.M.L. 1974). In addition, three of the seven actions involved here are already pending in the Southern District of New York. *See In re Joseph F. Smith Patent Litigation*, 407 F. Supp. 1403, 1405 (1976).

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. §1407, the actions listed on the following Schedule A and pending in districts other than the Southern District of New York be, and the same hereby are, transferred to the Southern District of New York and, with the consent of that court, assigned to the Honorable William C. Conner for coordinated or consolidated pretrial proceedings with the actions listed on Schedule A and pending in that district.

SCHEDULE A

Docket No. 290

DISTRICT OF COLUMBIA	Civil Action No.
James Bloor, etc. v. Riggs National Bank	76-1958
DISTRICT OF COLUMBIA NORTHERN DISTRICT OF ILLINOIS	
James Bloor, etc. v. First National Bank of Chicago	76-C-3905
SOUTHERN DISTRICT OF NEW YORK	
James Bloor, etc. v. Jerome Dansker, et al.	76-Civ-4679 (WCC)
Morris Katz, et al. v. Jerome Dansker, et al.	76-Civ-4721 (WCC)
Robert Morse, et al. v. Peat Marwick Mitchell & Co., et al.	75-Civ-3681 (WCC)
NORTHERN DISTRICT OF OHIO	
James Bloor, etc. v. First National Bank of Akron	C-76-336A
NORTHERN DISTRICT OF OHIO EASTERN DISTRICT OF VIRGINIA	
James Bloor, etc. v. Virginia National Bank	76-639-N

CONCURRING OPINION

EDWARD WEINFELD, JUDGE OF THE PANEL, WITH WHOM JOHN MINOR WISDOM, CHAIRMAN OF THE PANEL, JOINS,

I concur in the decision of my brethren that the actions before us pending in districts other than the Southern District of New York should, pursuant to 28 U.S.C. §1407, be transferred to that district for coordinated or consolidated pretrial proceedings with the actions pending there. I also agree with my brethren that the venue provision of the National Bank Act, 12 U.S.C. §94, does not prohibit transfer under Section 1407 of actions in which national banks are parties. Unlike my brethren, however, I am of the view that the Panel should adopt as policy the Supreme Court's recent recognition in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976), that the purpose of 12 U.S.C. §94 was to prevent interruption in the business of national banks that might result from their records being sent to distant counties, 426 U.S. at 156. Accordingly, I would include in the Panel's transfer order in this litigation a provision that with respect to the national bank defendants and discovery or inspection of their records shall be had only in each bank's home district.

ORDER OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR WRIT OF MANDAMUS

(Dated December 9, 1977)

77-3053

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

IN RE: FIRST NATIONAL BANK OF AKRON, THE FIRST NATIONAL BANK OF CHICAGO, THE RIGGS NATIONAL BANK OF WASHINGTON, D.C., AND VIRGINIA NATIONAL BANK,
Petitioners

A petition for a writ of mandamus having been filed

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied

/s/ IRVING R. KAUFMAN
Chief Judge
/s/ WILFRED FEINBERG
/s/ WILLIAM H. TIMBERS
Circuit Judges

ORDER OF THE UNITED STATES DISTRICT COURT

(Dated January 31, 1978)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re
INVESTORS FUNDING CORPORATION OF NEW YORK SECURITIES LITIGATION

MDL DOCKET NO. 290
Cross References
as Follows:
Morse v. Peat, Marwick
75 Civ. 3681(WCC)
Bloor v. Dansker
76 Civ. 679 (WCC)

ORDER

CONNER, *D. J.*:

Magistrate's Report No. 7 is confirmed with respect to the motions filed on behalf of First National Bank of Akron, Virginia National Bank, The Riggs National Bank of Washington, D. C. and the First National Bank of Chicago; the motions to dismiss on grounds of improper venue are denied without prejudice to their renewal upon completion of discovery to be conducted in the coordinated actions. The motion of defendant First National Bank of Akron to dismiss the complaint for lack of personal jurisdiction is denied, without prejudice to renewal upon com-

pletion of discovery herein. Magistrate's Report No. 7 is moot with respect to the motion on behalf of defendant Federal Deposit Insurance Corporation, as Receiver for Franklin National Bank, that action having been severed and transferred to the Eastern District of New York by agreement and upon this Court's order of January 31, 1978.

/s/ WILLIAM C. CONNER
United States District Judge